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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PIER 39 LIMITED PARTNERSHIP,

Cross-complainant, Cross-defendant and Respondent,

v.

FLAGS & THINGS ENTERPRISES, INC.,

Cross-defendant, Cross-complainant and Appellant.

A128944, A128945, A130838, A131615

(San Francisco City & County Super. Ct. No. CGC-02-411778)

Appellant Flags & Things Enterprises, Inc. (Flags) leased retail space from respondent Pier 39 Limited Partnership (Pier 39). Flags filed claims against Pier 39 for unfair business practices and breach of the covenant of good faith and fair dealing. In turn, Pier 39 filed a cross-complaint against Flags for unpaid rent, joining Flags's president, appellant Joseph Abuzaid, as a defendant on the basis of Abuzaid's guaranty of Flags's leases. Five months before the scheduled trial, Flags fired its attorneys without arranging for substitute counsel. As the time toward trial ticked down, Abuzaid failed to retain new counsel for his corporation and declined to commit to retaining new counsel. One month prior to trial, the trial court dismissed Flags's claims for delay of prosecution and later entered a default judgment against it on Pier 39's cross-complaint. Soon after, the trial court found Abuzaid to be a guarantor of Pier 39's liability on the cross-complaint and, without providing Abuzaid the opportunity to contest Flags's liability, entered judgment against Abuzaid. Flags failed to file a timely appeal of the judgments

entered after its failure to retain counsel, although it did appeal certain postjudgment orders. Abuzaid filed a timely appeal of the judgment against him.

Abuzaid and Flags raise a wide variety of arguments challenging the various rulings against them. We conclude Flags forfeited its claims of error in entry of the judgments against it when it failed to appeal them, and we affirm those judgments, although we modify the amount of damages awarded. We reverse and remand the judgment against Abuzaid as guarantor, concluding the trial court erred in failing to afford him the opportunity to challenge Flags's liability and damages.

I. BACKGROUND

This is our second decision in this matter.[1] As recounted in our first decision, *Pier 39 Limited Partnership v. Flags & Things Enterprises, Inc.* (June 13, 2006, A109345 [nonpub. opn.]) (*Pier 39 I*), Pier 39 was the landlord for a retail store operated by Flags. Pier 39 initiated this lawsuit on August 22, 2002, by filing a complaint against Flags for breach of lease. Those claims were eventually settled, but in the course of the litigation both Flags and Pier 39 had asserted a number of other claims by way of cross-complaint. Following a court trial, Pier 39 was awarded modest damages on its cross-complaint against Flags, while judgment was entered against Flags on its cross-complaint against Pier 39. In *Pier 39 I*, we affirmed the judgment for Pier 39 on its cross-complaint; reversed the judgment against Flags on its cross-complaint; and remanded the matter to allow Flags to proceed on its claims for breach of the implied covenant of good faith and fair dealing and unfair business practices. Remittitur issued on September 11, 2006.

Following remand, Pier 39 filed another cross-complaint against Flags, this one joining Abuzaid as a defendant. The new cross-complaint alleged breach by Flags of two other retail leases. Abuzaid, Flags's president, was joined as a personal guarantor of Flags's performance under the leases. Soon after, Flags filed an amended cross-complaint against Pier 39. Abuzaid was joined as a cross-complainant, asserting his own

[1] We have also heard two appeals in a related action filed by Abuzaid against Pier 39. (*Abuzaid v. Pier 39 Limited Partnership* (June 29, 2009, A122629) [nonpub. opn.]; *Abuzaid v. Pier 39 Limited Partnership* (July 23, 2010, A123911) [nonpub. opn.].)

claims against Pier 39. Thereafter, Flags and Abuzaid filed two additional amended cross-complaints, and demurrers were granted to their new claims for breach of fiduciary duty, breach of implied contract, unjust enrichment, and false promise. Flags's original claims remained for trial.[2]

On April 2, 2009, Flags filed a "Motion to Set Case for Trial," arguing Code of Civil Procedure[3] section 583.320, subdivision (a)(3), which requires a case remanded after appeal to be tried within three years, required trial to commence by September 10, 2009. Pier 39 stipulated to the requested relief, and on April 17, 2009, the trial court entered an order setting trial for August 31, 2009. Over the next few months, the parties stipulated to a series of extensions of the trial date and the date within which the case was to be brought to trial under section 583.320, subdivision (a)(3). Ultimately, the trial date was set for March 22, 2010, and the time to bring the case to trial was extended to April 5, 2010.

At the time of the hearing at which agreement on the final extension was reached, September 2009, Flags was represented by two different San Francisco law firms. During the two following months, Flags's dissatisfaction with their performance caused both firms to withdraw from their representations, leaving Flags without counsel. When the second attorney withdrew in early November 2009, explaining he had been "terminated" by Flags, he requested a 60-day stay to permit Flags to find new counsel. The court denied the request, finding it too long, given the "lots of activities to be done."

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[2] During the pretrial period, the case was assigned to at least three different judges of the superior court. Appellants hint at improprieties in these assignments. While it appears one motion to assign was handled by judges other than the presiding judge, in violation of the court's local rules (Super. Ct. City & County of S.F., Uniform Local Rules, rules 3.2(B) & 3.2(C)), Flags does not suggest this violation constitutes a basis for reversing or otherwise modifying the judgments. There is no basis in the record for Flags's apparent contention the assignments were the result of collusion, bias, or improper manipulation by Pier 39.

[3] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

Nonetheless, the court stayed the proceedings for all purposes other than Flags's retention of new counsel.

The court scheduled a case management conference for December 17, 2009, at which time Abuzaid was to report on his progress in finding new counsel. At the hearing, Abuzaid told the court he had yet to retain counsel for Flags and requested a further 60 days, which was granted.

By time of the next hearing, on February 18, 2010, barely one month prior to the scheduled trial date of March 22 and over three months after Flags's second attorney was permitted to withdraw, Flags had yet to retain counsel. Explaining the failure, Abuzaid said, "My lawyers and Pier 39 attorneys have not given me all my documents to be able to finish my analysis to be able to find [an] appropriate lawyer." Asked whether he intended to get another lawyer, Abuzaid responded, "I am not really sure" and declined to provide a time within which he would commit to making a decision.

Noting the urgency of commencing trial preparation, Pier 39's attorney requested "that the court exercise its inherent authority to dismiss Flags' case for failure to prosecute, maybe set a hearing out for Order to Show Cause in a couple weeks, but at least to give Pier 39 time before the trial to know whether or not the trial is going to go forward or not." The court complied with the request, setting a show cause hearing "why this entire case should not be dismissed for failure of Flags & Things to be represented by counsel as required by California law." The court initially suggested a hearing date of February 23, just five days away. When Abuzaid said "[i]t would be nice if you could delay it another week" because he was unavailable on February 23, the court set the hearing for March 3, thereby providing Flags two weeks to prepare its response. Abuzaid said this date was "just fine."

At the time, the court explained to Abuzaid, "Here's the problem, Mr. Abuzaid. You're costing a lot of people a lot of money. We have a trial set. [¶] . . . [¶] You also had a string of lawyers here who you fired. It's not as if your corporation finds itself without counsel because the lawyers are withdrawing. You're firing them . . . . [¶] . . . [¶] . . . I've told you what the rules are, I assume your lawyers have told you what the rules

are, so if you don't show up with a lawyer or give an adequate explanation as to what else I should do instead of throwing you out of court, Flags & Things will be dismissed with prejudice for failure to be represented by a lawyer as required by California law."

At the hearing on March 3, less than three weeks before the scheduled trial date and one month before the expiration of the stipulated time to bring the case to trial, Abuzaid said he was "in the process of" retaining counsel. He said a potential attorney was "supposed to show up" for the hearing, but "he did not." Under questioning by the court, Abuzaid claimed to be speaking with "a very high caliber professor in one of the big colleges in town" and "another one from Harvard University," both of whom he declined to name. Pressed further, Abuzaid acknowledged the potential new attorney had not actually committed to appear at the hearing but had merely been informed of its time and location.

Abuzaid also submitted an 83-page brief containing his explanation for the delay in obtaining counsel.[4] After reviewing the submission, the court noted, "It does not in any way provide good cause for giving you more time, nor does it provide a reasonable basis for believing that if you were given more time that anything would be any different than it is today. [¶] . . . We've had several hearings and there has been absolutely no progress, to my perception, nor an explanation, to make me believe . . . that there's any reason to believe that you are going to find a lawyer or that you are in any way flexible . . . to focus on the need to provide counsel for your corporation. [¶] . . . So I find that there is no basis for additional time. There is no reasonable basis for believing that given time that the situation will be any different, and therefore your request for additional time is denied. [¶] . . . [¶] . . . [Flags] is hereby dismissed from this action for failure to appear with counsel."

During discussions about further proceedings, counsel for Pier 39 requested that trial on its cross-complaint proceed prior to April 5, when the three-year statute was to expire. After the parties had difficulty in finding a mutually convenient date for a further

[4] We grant Flags and Abuzaid's motion to augment the record with this document.

hearing, Pier 39 agreed to extend the three-year statute to April 30, on condition discovery remained closed. Abuzaid agreed. A further conference was set for April 5.

At the April 5 hearing, the parties discussed the scope of the trial of the claims against Abuzaid as guarantor. At the outset of the hearing, the trial court expressed its view that Abuzaid had conceded his status as guarantor in discovery responses and pleadings but should be allowed to contest the amount of damages for which he would be liable. Counsel for Pier 39 disagreed, arguing Abuzaid, in addition to being bound by the default judgment as to liability, had no right to contest damages either. When asked to respond, Abuzaid re-argued at length the court's prior decision to enter judgment against Flags and ultimately requested a continuance. When Pier 39 declined to stipulate to any further extension of the date for trial, the court declined the request. Without resolving the issue, the court entered two written orders reflecting its dismissal of Flags as a party. The first struck with prejudice Flags's answer to Pier 39's cross-complaint, directed the clerk to enter Flags's default on the cross-complaint, and permitted Pier 39 to prove up its damages via affidavit. The second struck Flags's cross-complaint with prejudice and authorized entry of judgment for Pier 39 on Flags's cross-complaint.

The court then returned to the manner of resolution of the claims against Abuzaid as guarantor. Pier 39 reiterated its position that the sole issue to be tried was whether he was, in fact, a guarantor. When asked for a comment, Abuzaid said he wanted "a full trial" before a jury, without explaining the scope of the anticipated trial or specifying the issues to be tried. Turning to Pier 39, the court asked whether Abuzaid had the right to a jury trial "regarding the amount of his obligation." After further discussion, the court proposed conducting "a court trial on whether as a matter of law a guarantor would be liable for the amount found on a prove-up default of the principal." Abuzaid reiterated his demand for a jury trial. The court responded, "[Abuzaid's prior counsel], in response to the summary judgment motion, found an issue of material fact on common area maintenance, and that precluded summary judgment. So now we have to—we would have to try that, but the trial would be whether or not you are as a matter of law bound by whatever the default judgment is on your corporation. So it is my belief that that is a

legal question and that that should be set [for trial] before the end of this month." After further colloquy, the court told Abuzaid, "I'm going to set the trial for 9:30 on April 20, 2010, and, Mr. Abuzaid, you can come and argue anything you want and that will be preserved for the Court of Appeal." The court also noted Abuzaid would be permitted the opportunity to contest the validity of his signature on the guarantee, and concluded by saying, "Bring whatever witnesses and exhibits anybody wants, and it's going to be done on April 20th."

At the hearing on April 20, the court initially considered Flags's liability, finding the corporation responsible for damages of $440,780, and associated attorney fees of $383,134, based on declarations submitted by Pier 39. Abuzaid, although present, was not allowed to participate in this portion of the hearing. The court then turned to "trial on the guarantee," noting Abuzaid had submitted two legal pleadings that morning. One of them was a brief arguing his right to a jury trial and objecting to Pier 39's reliance on a separate statement of undisputed facts submitted in connection with a summary judgment motion. A section of the brief argued, "It is well established that a judgment against a principal is not binding in a separate action against a surety," citing, among other authority, *All Bay Mill & Lumber Co. v. Surety Co.* (1989) 208 Cal.App.3d 11 (*All Bay*), and demanding a jury trial "on the issue of the amount of his liability, including any defenses he may have." The second pleading objected to the court's taking of judicial notice with respect to certain documents.[5] When asked for comment by the court, Abuzaid effectively declined to participate in the proceeding other than through these pleadings.[6] After hearing argument from Pier 39, the court held Abuzaid had waived a

[5] These two pleadings were not included in the appellate record filed with the court, but Abuzaid submitted copies of them in connection with a supplemental brief requested by the court, filed on July 30, 2012. We have taken judicial notice of the content of the documents.

[6] Abuzaid responded to the court's inquiries throughout the hearing with the same statement, repeating on more than 20 occasions, "Your Honor, I am entitled to a jury trial separate and apart from any prove-up of a default against Flags & Things. Everything I have to state to you today, I have placed in the two papers I have presented to the Court."

jury trial under section 631, subdivision (d)(4) by failing to request it at the April 5 hearing.

The court then asked Pier 39 if it wished to make an opening statement. At the outset of the statement, Pier 39's counsel made a "motion in limine," arguing "this phase [of the hearing] involves a very narrow question of whether he is the guarantor of the outstanding debts of Flags" and seeking to exclude evidence directed at any other issue. The court did not expressly rule on the motion. After Abuzaid declined to make an opening statement, Pier 39 introduced evidence, largely in the form of pleadings and discovery responses, in which Abuzaid acknowledged the guarantee. Although Pier 39's counsel was sworn as a witness, his testimony merely supported introduction of these materials. Following this testimony, the court gave Abuzaid the opportunity to present evidence, but he declined to offer anything beyond the two pleadings. The court then found Abuzaid to be a guarantor, based on his admissions during pretrial proceedings. On April 22, judgments were entered against Flags on its cross-complaint and against both Flags and Abuzaid on Pier 39's cross-complaint.

At the end of the April 20 trial, Pier 39's counsel asked the court to schedule a hearing on the amount of attorney fees due under Flags's cross-complaint. Out of concern for the expiration of the statutory time to trial, counsel asked for a hearing prior to April 30. Because a default had been entered against Flags, Pier 39 requested the hearing be conducted ex parte. When Abuzaid objected to a hearing date of April 29, the court asked whether Pier 39 intended to collect the attorney fees from Abuzaid personally under the guaranty. Counsel responded, "We do not," confirming the award of fees "would be collectible, enforceable only against Flags and not against Mr. Abuzaid." The court then set the hearing for April 29. Although Pier 39 filed an ex parte application for fees, it served a copy of the application on Abuzaid in advance of the April 29 hearing.

Abuzaid's only other comment was a refusal to extend the statutory time for bringing Pier 39's claims to trial.

On April 29, the court granted attorney fees on Flags's cross-complaint in the amount of $2,047,157.

Abuzaid filed an appeal from the judgment against him as guarantor, and Flags appealed the award of attorney fees against it on its cross-complaint. Flags did not, however, appeal the judgments dismissing its cross-complaint and finding it liable on Pier 39's cross-complaint.

In September 2010, Flags filed a motion "for relief from the default judgment entered against Flags and Mr. Abuzaid" pursuant to section 473. Supported by declarations attesting to the unsuccessful but diligent efforts by Abuzaid to locate counsel after the withdrawal of his two law firms, the motion argued Abuzaid's failure to retain new counsel for Flags constituted "excusable neglect" under the statute. For the first time, Flags argued the five-year statute of section 583.310, and not the three-year statute of section 583.320, set the limit for bringing the case to trial, and it contended the five-year statute had yet to expire when judgment was entered because of various tolling events. The motion also argued the judgment was void because Flags did not receive sufficient notice of the dismissal under California Rules of Court, rule 3.1340.

At a hearing on October 25, 2010, the trial court denied the motion to vacate the default. Summarizing its view, the court explained, "There is no mistake, inadvertence or excusable neglect. There's a whole lot of lawyers that didn't want to represent Mr. Abuzaid's company, period. I don't even know what the claimed neglect is other than neglect on the part of a lawyer to take the case. I believe that I bent over backwards and further to give Mr. Abuzaid plenty of time to try to find counsel. [¶] . . . It seemed to me that Mr. Abuzaid made informed, knowledgeable, deliberate decisions regarding his lawyers throughout the course of this litigation, . . . and ran into a lot of difficulty, which was apparent from the record." The ruling was confirmed in a written order filed November 9, 2010. Flags timely appealed this order.

Ten days later, Flags and Abuzaid filed a motion, variously entitled "Motion . . . to Reconsider September 13, 2010 Motion to Set Aside Default Judgment and to Vacate Default Judgment" and "Motion . . . to Amend its Motion for Relief from Default

Judgment and for Setting Aside Default Judgment and All Orders and Proceedings Based Thereon as Void." The new motion argued (1) the court lacked authority to strike Flags's answer to the Pier 39 cross-complaint, (2) the court awarded damages to Pier 39 in excess of the amount claimed in its pleadings, (3) the judgment against Abuzaid as guarantor was void because the court did not permit him to contest Flags's liability on the cross-complaint, (4) the court improperly denied Abuzaid a jury trial, and (5) the court denied Flags due process by sanctioning it for failing to obtain counsel prior to the expiration of the time to bring Flags's case to trial. In an order dated March 14, 2011, the trial court denied this motion on the grounds it lacked jurisdiction to address the orders granting Pier 39's motion for attorney fees and denying Flags's motion to vacate the default judgment as a result of the intervening appeals and, "[a]s to all other matters addressed in the Motion, there ha[ve] been no grounds stated for relief." This order was also appealed. We granted the motion of Pier 39 and Abuzaid to consolidate all of their appeals for hearing and decision.

II. DISCUSSION

Flags and Abuzaid raise a wide variety of claims with respect to the proceedings below. For clarity, we consider separately the claims applicable to each of the appealed rulings of the trial court.

A. *Flags's Claims of Error Were Forfeited When it Failed to Appeal the Judgment*

The argument section of Flags's opening brief begins with a series of arguments contending the trial court erred in various ways in dismissing Flags's cross-complaint and striking Flags's answer to Pier 39's cross-complaint as a result of Flags's failure to retain counsel. As noted above, Flags did not appeal the judgments resulting from these orders. Instead, it appealed only the denial of three subsequent orders relating to the judgments—the orders denying its motion to vacate the default under section 473, denying its motion to reconsider this denial, and awarding attorney fees on its cross-complaint. Pier 39 contends Flags has forfeited its right to raise claims of error in the granting of these judgments by failing to appeal them. We agree.

Claims of error with respect to a judgment, other than a lack of personal or subject matter jurisdiction, must be raised before the judgment becomes final. (*Lee v. An* (2008) 168 Cal.App.4th 558, 565–566.) The failure to appeal an appealable order renders the order "final and not reviewable." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524; *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 998.) Stated another way, compliance with the statutory time for filing a notice of appeal is mandatory and jurisdictional. (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582.) "The taking of an appeal is not merely a procedural step, but is jurisdictional, and where no appeal is taken from an appealable order, a reviewing court has no discretion to review its merits; the court must disregard all issues concerning the order on its own motion even if no objection has been made." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 158.)

Flags's timely appeals of other orders of the trial court did not give it carte blanche to raise challenges to other appealable rulings rendered in the course of the proceeding. " 'Upon an appeal' from an appealable order or judgment, 'the reviewing court may review . . . any intermediate ruling, proceeding, order or decision . . .' [citations], but it may not review an earlier appealable ruling." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1370–1371, fn. omitted [failure to file appeal from order dismissing all claims against one defendant bars appellate review of dismissal on appeal of final judgment].)

Flags argues correctly that its failure to file an appeal of the judgments did not forfeit its right to challenge them as void. As discussed in more detail below, however, a claim of void judgment is very narrow. To demonstrate a judgment is void, a party must show the rendering court lacked "fundamental" jurisdiction, which is defined as a lack of either personal or subject matter jurisdiction. (*People v. American Contactors Indemnity Co.* (2004) 33 Cal.4th 653, 660–661.) Mere claims of error, which constitute the bulk of Flags's arguments, do not state grounds for a finding the judgment was void, since they are unrelated to fundamental jurisdiction. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) With respect to most of these arguments, Flags makes no attempt to demonstrate

voidness, instead contending only that the court erred. Accordingly, we lack jurisdiction to consider these claims.[7]

B. ***The Denial of the Motion to Vacate Flags's Default***

Flags did file an appeal from the denial of its motion under section 473 to vacate the default judgment entered against it on Pier 39's cross-complaint and is entitled to raise claims of error with respect to the trial court's denial of that motion. Flags argues the trial court abused its discretion in denying its motion to vacate the default judgment because (1) it demonstrated excusable neglect in Abuzaid's diligent efforts to locate replacement counsel and (2) the judgment was void for lack of notice of the default hearing. Pier 39 counters Flags did not act as a reasonably prudent person in locating counsel and, as a separate ground for affirming the trial court's refusal to vacate the default judgment, contends the court was without power to vacate the default because the time for bringing the case to trial under section 583.320 had expired.

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[7] For want of jurisdiction, we cannot and do not consider the following arguments from Flags's opening brief: (1) "The Court Erred in Dismissing Flags as a Party for Failure to Obtain Counsel"; (2) "The Clerk Was Not Permitted to Enter the Default"; (3) "The Court Erred in Dismissing Flags as a Party and Striking Its Cross-Complaint for Failure to Prosecute its Claims"; (4) "The Court Expressly Relied on an Incorrect Application of the Limitations Period"; (5) "The Court Lacked Authority to Dismiss Flags's Cross-Complaint with Prejudice"; (6) "Because Flags Did Not Willfully Violate the Court's Orders, the Court's Dismissal of Flags's Cross-Complaint is Reversible Error."

We also do not address Flags's argument the trial court erred in entering summary judgment while it was not represented by counsel. In addition to Flags's having forfeited this argument by failing to appeal, the argument was rendered moot by entry of the default judgment.

The following arguments, to the extent they claim errors resulting in a void judgment, are considered below: (1) "The Court Was Not Permitted to Strike Flags's Answer and Enter a Default"; (2) "Because the court failed to give Flags the statutorily-required notice and unreasonably refused to allow Flags time to minimally consult with counsel, the Court's order dismissing Flags' cross-complaint is null and void."

1. *Excusable Neglect*

Section 473, subdivision (b) provides in pertinent part that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect," provided relief is sought "within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." The burden of proof in demonstrating circumstances justifying relief under section 473 falls on the party seeking relief. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410.) "As the discretion to grant or deny a Code of Civil Procedure section 473, subdivision (b) motion is soundly vested in the trial court, we may only disturb its ruling by finding that the court abused its discretion." (*Conservatorship of Buchenau* (2011) 196 Cal.App.4th 1031, 1038.)

To establish excusable neglect, a litigant must demonstrate conduct that " 'might have been the act of a reasonably prudent person under the same circumstances.' " (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) " 'The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief. [Citations.] It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. [Citation.] Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. . . . The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded.' " (*Ibid.*)

In denying Flags's motion, the trial court reasoned the default was a direct result of Flags's decision to terminate its association with attorneys who were providing competent legal services prior to locating substitute counsel. This was a voluntary and

willful act, not an act of mistake or neglect. We find no abuse of discretion in the trial court's reasoning.

The trial court's finding that Flags made a voluntary choice to leave itself without counsel was supported in the record. Although Abuzaid claimed in a declaration in support of the motion to vacate that both law firms withdrew from the representations on their own initiative, there was substantial evidence to the contrary. Flags's first set of attorneys, Seiler Epstein Ziegler & Applegate, stated in seeking to withdraw that Flags had refused to pay the firm. This represented, as a practical matter, a dismissal of the firm. An attorney for the second law firm, Coblentz, Patch, Duffy & Bass, told the court in withdrawing that his firm had been "terminated" by Flags. Further, Flags cited no misconduct or malpractice by counsel to justify the terminations.

While Flags was entitled to representation by counsel of its choice, it was required to make its decisions about counsel in the manner that " 'a man of ordinary prudence usually bestows upon important business.' " (*Hearn v. Howard*, *supra*, 177 Cal.App.4th at p. 1206.) The trial court did not abuse its discretion in concluding the decision to discharge counsel without first locating substitute counsel was not reasonably prudent, since the circumstances of the litigation created real and obvious difficulties for Flags in finding substitute counsel. When Flags's second set of attorneys withdrew in November 2009, the discovery period was already closed, and trial was set to begin in four and a half months. Because no new counsel had been identified, some of the remaining time to trial would inevitably be spent in finding counsel. Even assuming substitute counsel could be found promptly, the new attorneys would find it difficult to prepare for trial in the time remaining. For this reason, attorneys might be reluctant to take on the representation.

Even if Flags's decision to discharge its existing attorneys in the absence of substitute counsel could be characterized as prudent, Abuzaid's subsequent search did not demonstrate the type of urgency expected of a prudent person in these circumstances. According to his declaration in support of the section 473 motion, he did not begin seriously looking for a new attorney until December 2009, a month after the withdrawal

of his second set of attorneys, despite having conflicts with both sets attorneys for several months prior. At hearings following the withdrawal of Flags's attorneys, Abuzaid demonstrated a causal attitude toward retaining new counsel. As late as February 18, 2010, three months after their withdrawal, Abuzaid told the court he had not "be[en] able to finish my analysis" preparatory to finding a new lawyer and was "not really sure" whether he would retain new counsel.

Flags cites a number of cases in support, but each is distinguishable. This is not a case of attorney neglect, over which the moving party had no control. (E.g., *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 234; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 686–687.) On the contrary, as discussed above, the default was a direct result of Flags's conscious, voluntary conduct. The other two cases, *Ebersol v. Cowan* (1983) 35 Cal.3d 427 and *Flores v. Board of Supervisors* (1970) 13 Cal.App.3d 480, arose in the context of an application under Government Code section 946.6 for relief from the failure to file a timely governmental claim. In both cases, the putative plaintiffs demonstrated they were unable to locate and hire counsel to file a timely claim despite a diligent search, thereby justifying a finding of "excusable neglect." (*Ebersol*, at p. 437; *Flores*, at p. 485.) The difference between the circumstances in these two decisions and this situation is that Flags brought the need to find counsel in a short period of time upon itself, as discussed above. The plaintiffs in *Ebersol* and *Flores* were unrepresented prior to the occurrence of the events underlying their claims, since they had no need of counsel. They therefore were limited to the claim filing period to locate counsel. Flags, in contrast, was required to, and in fact had counsel, because it was already involved in litigation. It could have begun the search for counsel prior to terminating its attorneys and refrained from the termination altogether if it failed to locate acceptable new counsel. By terminating its attorneys prior to locating substitute counsel, it voluntarily and imprudently created the circumstances that led to its default.

Because the trial court did not abuse its discretion in concluding Abuzaid did not act as a reasonably prudent person in the circumstances, there is no basis for vacating the entry of a default judgment against Flags on Pier 39's cross-complaint.

2. *Lack of Jurisdiction*

As a second, independent ground for affirming the trial court's refusal to vacate the default judgment under section 473, subdivision (b), Pier 39 argues that by the time Flags made the motion in September 2010, the time for bringing the case to trial under section 583.320, as voluntarily extended by the parties, had long since expired, depriving the court of jurisdiction to grant the requested relief. We find no legal basis for the argument.

The authority cited by Pier 39 holds that section 473 cannot provide relief from a dismissal for failure to meet the statutory time to trial. (E.g., *Tustin Plaza Partnership v. Wehage* (1994) 27 Cal.App.4th 1557, 1565–1566 & fn. 9.) Judgment against Flags, however, was not entered as a result of the expiration of the statutory time to trial. On the date the order of default was rendered, March 3, 2010, Flags still had 33 days to bring its cross-complaint to trial before the stipulated expiration date of April 5. The trial court expressly noted Flags's cross-complaint was dismissed "for failure to be represented by a lawyer as required by California law," not as a result of the expiration of the time to bring the case to trial.

Pier 39 argues the time to bring the case to trial had expired by September 2010, when the motion to vacate the default was filed. While this would presumably have been true in the absence of the order dismissing Flags's cross-complaint, the entry of that order precluded any expiration of the statutory time to trial. Under section 583.340, subdivision (c), the statutory time to trial excludes any period during which "[b]ringing the action to trial . . . was impossible, impracticable, or futile." By dismissing Flags's cross-complaint, the trial court unquestionably made it "impossible" for Flags to bring the matter to trial. As a result of this tolling, at the time Flags filed its motion to vacate, it had at least 33 days remaining to bring the cross-complaint to trial.

Because we reject Pier 39's argument that the three-year time to trial had expired when the trial court considered Flag's motion to vacate the default, we need not consider Flag's argument that the five-year, rather than the three-year statute should have been applied to determine the statutory time to trial. Similarly, we have no reason to consider

Pier 39's contention that Flags is judicially estopped from advocating for application of the five-year rule.

3. *Void Judgment*

In addition to moving under section 473, subdivision (b), Flags sought to have the judgment dismissing its cross-complaint for delay in prosecution set aside as void, as permitted by section 473, subdivision (d), because Flags was not provided sufficient notice of the order to show cause for the dismissal under California Rules of Court, rule 3.1340. We review de novo a trial court's ruling on a claim of void judgment. (*Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 146.)

Section 583.410, grants the trial court authority to dismiss an action for delay in prosecution pursuant to rules adopted by the Judicial Council. (§ 583.410, subd. (b).) Under those rules, a plaintiff must be given 20 days' notice of a motion to dismiss under section 583.410 if the dismissal is initiated by the court and 45 days' notice if initiated by an opposing party. (Cal. Rules of Court, rules 3.1340(b), 3.1342(a); see *Sakhai v. Zipora* (2009) 180 Cal.App.4th 593, 598.) By providing only 14 days' notice of the motion to dismiss, the trial court violated both standards.

Flags waived any objection on this ground by failing to raise it at either the February 18 or March 3 hearing. Under section 1005, the trial had discretion to shorten the time otherwise required by California Rules of Court, rules 3.1340 and 3.1342. (See *Moore v. El Camino Hosp. Dist.* (1978) 78 Cal.App.3d 661, 664 [trial court did not err in shortening time for a motion to dismiss for delay in prosecution].) Good cause for such a shortening certainly existed here. At the time the issue of dismissal was raised, on February 18, barely one month remained before the scheduled trial date of March 22. As Pier 39 argued at the time, it was entitled to a ruling on its request for dismissal before it incurred the expense of preparing for trial. Had Flags raised the issue of timing under the California Rules of Court on February 18, the trial court would have had an opportunity to articulate its reasoning for the scheduling it elected. When Abuzaid expressly consented to the court's proposed scheduling and failed to raise the issue of the notice period under rules 3.1340 and 3.1342, Flags waived any objection based on the timing of

the motion. (E.g., *Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1578 [“where, as here, a party expressly consents to the untimely hearing date, he has thereafter waived his right to object thereto. [Citations.] Phrased otherwise, ‘He who consents to an act is not wronged by it’ ”].)

In any event, the trial court’s violation of the California Rules of Court did not result in a void judgment. A judicial act is void only if, at the time it rendered the decision, the court lacked “fundamental” jurisdiction. (*People v. American Contactors Indemnity Co.*, *supra*, 33 Cal.4th 653, 660.) “Essentially, jurisdictional errors are of two types. ‘Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’ [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and ‘thus vulnerable to direct or collateral attack at any time.’ [Citation.] [¶] However, ‘in its ordinary usage the phrase “lack of jurisdiction” is not limited to these fundamental situations.’ [Citation.] It may also ‘be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no “jurisdiction” (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ (*Ibid*.) ‘ “[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.” ’ [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by ‘principles of estoppel, disfavor of collateral attack or res judicata.’ ” (*Id.* at pp. 660–661.) When Flags failed to appeal the judgment dismissing its cross-complaint, it forfeited its right to challenge the judgment on grounds making it merely voidable, as distinguished from void. (*Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1531; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1225 [voidable judgments are valid unless challenged directly].)

Flags makes no claim the trial court lacked fundamental jurisdiction, i.e., personal or subject matter jurisdiction.[8] Instead, Flags merely claims the trial court violated a statutory procedural requirement. Statutory provisions whose violation results in a void act are generally said to be "mandatory," contrasted with merely "directory" statutes. (*People v. Lara* (2010) 48 Cal.4th 216, 224.) The terms are, however, misleading. A statute is not "mandatory" merely because a court is required to comply with it. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 924 [even "obligatory" statutory provisions are commonly accorded only directory effect].) Most violations of procedural statutes do not even result in acts in excess of jurisdiction, let alone lead to an absence of jurisdiction.[9] (*In re Marriage of Goddard, supra,* 33 Cal.4th 49, 56.) "[M]ost procedural errors are not jurisdictional. [Citations.] Once a court has established its power to hear a case, it may make errors with respect to areas of procedure, pleading, evidence, and substantive law." (*Ibid.*) In asserting a violation of the timing provisions of the rules of court, Flags at most claims a procedural error, which, because it did not deprive the court of either personal or subject matter jurisdiction, did not render the judgment void.

Flags also claims the judgment is void because it did not receive due process in connection with the entry of default. There appears to be a conflict in California decisions whether a lack of due process renders the entry of a default judgment void or merely voidable. (See *Adoption of B.C.* (2011) 195 Cal.App.4th 913, 925 [judgment entered without due process is void]; *Johnson v. E-Z Ins. Brokerage, Inc.* (2009)

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[8] Any potential lack of personal jurisdiction was long since waived by Flags's participation in the litigation. As a court of general jurisdiction hearing an ordinary contract case, the trial court plainly had subject matter jurisdiction over this matter. (See *Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 181 Cal.App.4th 752, 767 [" '[a] court does not necessarily act without subject matter jurisdiction merely by issuing a judgment going beyond the sphere of action prescribed by law' "].)

[9] Whether a statute is mandatory or directory is a matter of legislative intent. Although Flags cites the distinction between mandatory and directory statutes, it makes no attempt to demonstrate the Legislature intended section 583.410, subdivision (b) and the implementing rules to be mandatory, rather than directory. Further, there is no indication the rules adopted pursuant to subdivision (b) of section 583.410, which were not themselves enacted by the Legislature, were intended to be mandatory.

175 Cal.App.4th 86, 98–99 [default judgment entered without prior notice not void]; *Lee v. An*, *supra*, 168 Cal.App.4th 558, 563–565 [same].)[10] For the reasons discussed above, we conclude, with *Johnson* and *Lee*, that any failure to afford due process rendered the default judgment voidable, rather than void.

In any event, we find no deprivation of due process. Fundamental to due process is notice and a meaningful opportunity to be heard. (*City of Santa Monica v. Gonzalez, supra,* 43 Cal.4th at p. 927; *Cohen v. Hughes Markets, Inc.* (1995) 36 Cal.App.4th 1693, 1698–1699 [trial court must provide advance notice before dismissing for delay in prosecution].) Where these are provided, there is no violation of due process. (*City of Santa Monica v. Gonzalez,* at p. 929; see also *Cordova v. Vons Grocery Co.* (1987) 196 Cal.App.3d 1526, 1531–1532 [although court violated due process by dismissing for delay in prosecution without prior notice, subsequent consideration of motion for reconsideration provided due process].) Flags had two weeks' notice of the dismissal hearing, at which it had a full opportunity to voice its opposition. Flags's claim that the two-week period was inadequate is not borne out by the record. Abuzaid appeared at the hearing with a long and detailed memorandum in opposition and did not contend he needed additional time to prepare his opposition.

C. *Motion to Reconsider the Denial of Flags's Motion to Vacate Both Judgments Against It*

As Pier 39 argues, an overwhelming majority of decisions have held that an order denying a motion for reconsideration is not appealable, even when based on new facts or law. (See *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576–1577 [citing cases].) To the extent a few of the arguments raised in Flags's motion for reconsideration contended the trial court's judgments were void, we can construe the purported motion for reconsideration as a motion to vacate under section 473, subdivision (d), which can be made at any time, and consider an appeal of these issues. (*Schwab v. Southern California*

[10] The conflict may be more apparent than real. *Adoption of B.C.* appears to conflate the concepts of "void" and "voidable." (See *Adoption of B.C., supra,* 195 Cal.App.4th pp. 925–927 & fn. 12.)

Gas Co. (2004) 114 Cal.App.4th 1308, 1320.) Because a motion for reconsideration is not appealable, however, we are without jurisdiction to consider the remaining arguments.[11]

1. *Judgment in Excess of Demand*

The most substantial argument in the motion for reconsideration is Flags's contention the default judgment entered on Pier 39's cross-complaint was void under section 580 because the amount of damages awarded, $440,780, exceeded the amount of damages demanded in the cross-complaint, which sought as damages "a sum in excess of $97,586.52, according to proof."

Section 580, subdivision (a) states in relevant part: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115 . . . ." It has consistently been held that a judgment rendered in violation of section 580 is void as beyond the court's jurisdiction.[12] (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 (*Greenup*); *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1521.) Since the contractual relief granted to Pier 39 greatly exceeded the damages demanded in its cross-complaint, Flags's objection would appear to be well-taken.

Pier 39 argues it is entitled to the greater amount because Flags had actual notice during the course of the litigation that Pier 39's damages were substantially greater than

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[11] In addition, Flags had filed a notice of appeal of the trial court's denial of the motion to vacate prior to the trial court's hearing on the motion for reconsideration of that denial. As a result, by the time of hearing, the trial court itself lacked jurisdiction to reconsider the motion to vacate. (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

[12] Decisions have consistently referred to a default judgment in excess of the amount demanded to be "void" rather than "voidable." Because a judgment exceeding the demand is characterized as an act in excess of a court's jurisdiction, however, the latter term is technically the correct one. Regardless, there is substantial authority holding an objection under section 580 can be raised at "any time," like a challenge to fundamental jurisdiction. (E.g., *Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1286 [citing cases].) Because Pier 39 does not contend the judgment was merely voidable, as opposed to void, we need not consider whether Flags forfeited this argument by failing to raise it in a timely manner.

the $97,000 expressly demanded in the cross-complaint. Such an argument, which Pier 39 does not support by citation to pertinent authority, has been repeatedly rejected. It is true the underlying rationale for section 580 is to limit damages awarded on a default to those of which the defendant was provided notice. (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 60.) The language of the statute, however, does not confine its application in this manner. Rather, section 580 limits the damages recoverable on a default judgment to the amount demanded in the complaint, without mentioning the issue of notice.

The Supreme Court has consistently held to a literal reading of section 580. In *Greenup,* the court noted it had applied a "strict construction" of section 580, " 'no matter how reasonable [another approach] might appear in a particular case.' " (*Greenup, supra,* 42 Cal.3d at p. 826.) In implicit rejection of Pier 39's argument, the court stated: "Since *Becker* [*v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489], the Courts of Appeal have insisted that due process requires formal notice of potential liability; actual notice may not substitute for service of an amended complaint." (*Ibid.*; see also *In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166 ["Section 580, we have repeatedly stated, means what it says and says what it means: that a plaintiff cannot be granted more relief than is asked for in the complaint"].)

Following this authority, the Courts of Appeal have specifically rejected Pier 39's argument that actual notice of claimed damages is sufficient under section 580. In *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, a business tort case, the trial court entered the defendants' defaults as a discovery sanction. (*Id.* at p. 1172.) Although the complaint demanded damages " 'in an amount in excess of $50,000 and according to proof' " (*id.* at p. 1168), the trial court entered judgment for over $8 million, the amount of damages stated in a document entitled, " 'Plaintiffs' Statement of Damages and Plaintiffs' Notice of Amount of Punitive Damages Sought,' " that was served on defendants around the time of the motion seeking sanctions (*id.* at p. 1172). Notwithstanding the filing of this statement, the court limited the plaintiffs' recovery of damages to the $50,000 demanded in the complaint, finding irrelevant the

actual notice provided by the filed statement. (*Id.* at p. 1174.)[13] Pier 39's claims of notice to Flags are no different. Accordingly, under section 580, Pier 39 was limited to maximum damages of $97,586.52.

Although courts characterize a judgment entered in violation of section 580 as "void," the error does not require reversal of the default. Instead, the plaintiff is allowed to choose between the entry of an amended judgment with damages in the amount allowed by section 580 or the filing of an amended complaint containing the higher level of damages. Only in the latter case is the default vacated. (*Greenup, supra,* 42 Cal.3d at pp. 829–830; *Kim v. Westmoore Partners, Inc., supra*, 201 Cal.App.4th at p. 286 [" 'Ordinarily when a judgment is vacated on the ground the damages awarded exceeded those pled, the appropriate action is to modify the judgment to the maximum amount warranted by the complaint' "].) In its respondent's brief, Pier 39 requests the entry of an amended judgment, rather than the opportunity to seek the greater amount of damages. We will grant relief consistent with that request.[14]

2. *Remaining Voidness Claims*

Flags's motion for reconsideration made two other arguments it characterized as demonstrating the judgments were void.

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[13] Similar results were reached in *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 286; *Stein v. York* (2010) 181 Cal.App.4th 320, 326; *Schwab v. Southern California Gas Co., supra,* 114 Cal.App.4th at page 1321 ["due process requires *formal notice* of the defendant's potential liability, by service in the same manner as a summons. . . . actual notice is insufficient"]; *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 535 [same]; and *Morgan v. Southern Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 986, disapproved on other grounds in *Schwab v. Rondel Homes* (1991) 53 Cal.3d 428, 434.

[14] Notwithstanding section 580, under section 585, subdivision (a), a default judgment may include, in addition to damages not exceeding the amount demanded in the complaint, interest as allowed by law and contractual or statutory attorney fees, as determined by the court. (See, e.g., *Garcia v. Politis* (2011) 192 Cal.App.4th 1474, 1478–1479.) It is not clear from the record whether the trial court awarded Pier 39 prejudgment interest, which presumably must be recalculated, but its award of attorney fees is unaffected by section 580.

First, Flags argued the trial court's judgment was void because "[b]y striking Flag's [*sic*] answer and entering a default . . . , the Court improperly excused Pier 39 of its obligation to prove Flags' liability for the Pier 39 claims Flags' [*sic*] contested in its answer." Despite its characterization, this is not a voidness argument. As discussed above, Flags was required to demonstrate a failure of personal or subject matter jurisdiction to demonstrate voidness, and this argument does neither. (*People v. American Contactors Indemnity Co., supra,* 33 Cal.4th at pp. 660–661.) Indeed, Flags's own argument conceded as much, since it claimed the act was in "excess of the Court's jurisdiction," thus effectively acknowledging the argument was one that was forfeited when it was not raised on direct appeal.

Second, the motion contended the judgment against Abuzaid was void because the trial court refused to permit him to contest Flags's liability. We consider this claim below in connection with Abuzaid's appeal.

D. ***Abuzaid's Appeal of the Guarantor Judgment***

In the motion for reconsideration, Abuzaid contended the judgment against him as guarantor on Pier 39's cross-complaint was void because the trial court refused to permit him to contest Flags's liability on the cross-complaint. Because Abuzaid filed a timely notice of appeal of this judgment, he is not required to demonstrate the purported error rendered the judgment against him void, but merely that it constituted reversible error. We conclude it did.

All Bay Mill, supra, 208 Cal.App.3d 11 is controlling on this issue, holding that a default judgment against a debtor is not binding in an action to enforce the debt against a surety.[15] *All Bay* was an action on a construction bond. The plaintiff lumber company sued a contractor and its surety for nonpayment of a bill for materials. After the contractor defaulted on a cause of action that would have triggered the surety's liability, the lumber company sought to enforce the default judgment against the surety. The court

[15] Abuzaid is characterized as a "guarantor," but by statute there is no legal distinction in California between a surety and a guarantor. (Civ. Code, § 2787.)

rejected the argument that the principal's default was binding on the surety, holding, in language directly applicable here: "It is well established that a judgment against a principal is not binding in a separate action against a surety. [Citations.] Nevertheless, [the plaintiff] claims this rule is not applicable in the present case because . . . the principal and surety were sued in the same action. In our view, this is a distinction without a difference. [¶] . . . ' " . . . It is a general principle that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the cause of action and has been unsuccessful. . . .' " [Citation.] [¶] . . . In our view, it is irrelevant whether the judgment was obtained in a previous action or by default in the same action brought against the surety. In both cases, the surety must be given an opportunity to be heard in defense." (*Id.* at pp. 17–18, fn. omitted; accord, *National Technical Systems v. Superior Court* (2002) 97 Cal.App.4th 415, 421–422.) The court accordingly affirmed a judgment for the surety, despite the contractor's default on the same cause of action.[16]

Under *All Bay*, the trial court erred in entering judgment against Abuzaid solely on the basis of the default judgment against Flags. To recover against Abuzaid, Pier 39 was required to prove Flags's liability and its own damages at a trial in which Abuzaid was permitted to participate, and no such trial occurred.[17]

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[16] The Restatement Third of Suretyship and Guaranty takes the same approach. Under section 67, subdivision (3) of the Restatement, "When, in an action by the [creditor] against the [debtor] to enforce the underlying obligation, a judgment in favor of the [creditor] is obtained by default . . . , the judgment against the [debtor] is evidence only of its rendition in a subsequent action of the [creditor] against the [surety] to enforce the [surety agreement]." An illustration in the comments makes the meaning of this provision unmistakable: "C sues P on a debt with respect to which S is a secondary obligor [i.e., surety]. A default judgment is entered against P. C then sues S. The default judgment against P does not create a presumption of P's liability. Therefore, C must establish all the elements of S's liability pursuant to the secondary obligation." (Rest.3d Suretyship & Guaranty, § 67, com. c, illus. 5, p. 273.)

[17] At oral argument, counsel for Pier 39 suggested Abuzaid should be bound in his personal capacity by the trial court's determinations against Flags because he participated in all the relevant hearings on Flags's behalf and made all of the litigation decisions that

While recognizing the trial court's error, we were concerned the unusual events at the hearings on April 5 and April 20, 2010 might have resulted in a forfeiture of Abuzaid's right to a separate trial, particularly given his effective refusal to participate in the hearing on April 20. Following oral argument on this matter, we requested that the parties submit supplemental briefs addressing the issue of forfeiture.[18]

After reviewing the parties' submissions and the transcripts of the relevant hearings, we find no forfeiture. The comments of the trial court at the April 5 hearing regarding the scope of the April 20 hearing were inconsistent and confusing. It is true, as Pier 39 contends, the trial court made what seemed to be an open-ended comment about the nature of the anticipated hearing toward the end, telling the parties to "[b]ring whatever witnesses and exhibits anybody wants." Yet the court, a short time before, had described the nature of the hearing as "a court trial on whether as a matter of law a guarantor would be liable for the amount found on a prove-up default of the principal." By describing the "trial" as a hearing regarding a "matter of law," the court suggested it anticipated legal argument, rather than an evidentiary hearing. Further, shortly after this comment, the court told Abuzaid it viewed the issue to be resolved as "a legal question" and told him, "you can come and argue anything you want and that will be preserved for the Court of Appeal," again suggesting legal argument rather than an evidentiary hearing. While the trial court's comments were not entirely clear, Abuzaid could reasonably have

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resulted in Flags's default. Because Pier 39 did not plead and prove alter ego, however, there is no legal basis for finding Abuzaid personally liable solely on the basis of his conduct as a principal of Flags. (See *Schoenberg v. Romike Properties* (1967) 251 Cal.App.2d 154, 168 ["It is well settled that the authority of the court will be exercised to impose liability under a judgment upon the *alter ego* who has had control of the litigation"].)

[18] At the time, we were not aware of the contents of the pleadings given to the court by Abuzaid at the April 20 hearing, since counsel neglected to include these in the appellate record. Further, although Abuzaid cited *All Bay* in one of these pleadings, neither Abuzaid nor Pier 39 cited *All Bay* or any other controlling authority in their appellate briefs. The cases cited by Abuzaid on this issue were not on point, while Pier 39 contented itself with distinguishing Abuzaid's authorities, without citing any authority supportive of its own position.

interpreted them as limiting the April 20 hearing to legal argument about his right to present evidence on any issues other than his status as a guarantor, rather than permitting a full trial.

Abuzaid's written submission to the court is consistent with this interpretation, since it addresses his right to present evidence regarding Flags's liability. Further, the submission made clear his legal position that he could not be held liable for the debts of Flags without a separate trial on the issues of liability and damages, citing *All Bay*, arguing, "It is well established that a judgment against a principal is not binding in a separate action against a surety," and demanding a jury trial "on the issue of the amount of his liability, including any defenses he may have." This was sufficient to apprise the trial court of his legal position and preserve for appeal the trial court's decision not to hold a separate trial on Flags's liability.

In its supplemental briefing, Pier 39 argues any error was harmless because Abuzaid failed to establish prejudice from the trial court's failure to provide him a separate trial. In these circumstances, however, it was unnecessary for Abuzaid to demonstrate prejudice. Once it is accepted, as it must be under *All Bay*, that Abuzaid was entitled to a separate trial of Flags's liability and damages under the leases, the trial court's entry of judgment against him in the absence of such a trial constitutes a classic denial of due process. The trial court entered judgment against Abuzaid without any evidentiary hearing regarding Flags's breach of the leases, which the court presumed from Flags's default, and it set damages on the basis of an ex parte hearing at which Abuzaid was expressly barred from participating. He was therefore denied even the most fundamental aspects of legal process. In the face of this type of "structural error," a showing of prejudice is not required for reversal. (See, e.g., *Biscaro v. Stern* (2010) 181 Cal.App.4th 702, 709, 710 ["Unlike most legal error, structural error calls for reversal per se because the error prevents a reviewing court from ascertaining what might have happened absent the error"]; *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 292 [error reversible per se "where the trial court denies a party his right to a fair hearing"]; *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1550 [same].)

We reach this conclusion with some reluctance. The record clearly reflects the trial court's difficult, yet unceasing struggle to treat fairly an uncooperative pro se litigant who repeatedly attacked the integrity of the court and engaged in constant tactics of delay. By firing his attorneys and resolutely refusing to retain new counsel, yet taking no steps on his own to protect his interests as a litigant, Abuzaid arguably brought this judgment on himself. A review of the record demonstrates, however, that the trial court's denial of a fair hearing to Abuzaid was ultimately the result of Pier 39's baseless argument that judgment could be entered against Abuzaid solely in reliance on Flags's default, once he was found to be a guarantor.

Because the judgment against Abuzaid must be reversed for failure to provide him the requisite separate trial on Flags's liability under the leases, we need not address his other grounds for reversal.

E. ***Award of Attorney Fees Against Flags***

In its opening brief, Flags argues the order entering an award of attorney fees against it is "void" because it was awarded without notice to it, on the basis of an ex parte order, which "[n]either Flags nor Mr. Abuzaid had any meaningful chance to oppose."

While it is true the attorney fee award was entered on the basis of an ex parte application, it is not true the award was entered without notice to Flags. Abuzaid, Flags's president, was present in court when the ex parte hearing was scheduled on nine days' notice. Although the application for fees was made ex parte, Pier 39 served a copy of the application on Abuzaid. Accordingly, Flags's representative had actual notice of both the hearing and the basis for Pier 39's requested relief. Had Abuzaid retained counsel for Flags, the attorneys could have filed an opposition to the motion and appeared at the hearing on April 29. On this record, the trial court did not err in entering an award of attorney fees on the basis of Pier 39's ex parte application.

F. ***Dismissal of Abuzaid's and Flags's Claims on Demurrer***

Flags and Abuzaid contend the trial court erred in sustaining demurrers without leave to amend to Flags's claims of breach of fiduciary duty, breach of implied contract, unjust enrichment, and false promise, and Abuzaid's claims of breach of fiduciary duty

and breach of implied contract. Flags forfeited its challenge to these rulings when it failed to appeal the default judgment entered against it on the cross-complaint, but we consider Abuzaid's arguments.

Abuzaid's claims were added to the cross-complaint after the remand granted in *Pier 39 I*. The third amended cross-complaint added Abuzaid as a cross-complainant and pleaded a new cause of action on his behalf for breach of a fiduciary duty. Following the dismissal of that cause of action, the fourth amended cross-complaint added a new cause of action for breach of implied contract between Pier 39 and Abuzaid, which was also dismissed. Both claims were alleged by Abuzaid alone.

Pier 39 contends dismissal of Abuzaid's claims was proper because, among other reasons, they were barred by the statute of limitations. By the time the causes of action were alleged, several years had passed since the cross-complaint was filed and the events alleged in the cross-complaint had occurred. Abuzaid does not dispute that his claims were added after expiration of the statute of limitations, but he contends the claims were preserved by the doctrine of relation back. Because this presents an issue of law, we review the trial court's ruling de novo. (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1549 (*San Diego Gas & Electric*).)

"The relation-back doctrine deems a later-filed pleading to have been filed at the time of an earlier complaint which met the applicable limitations period, thus avoiding the bar. In order for the relation-back doctrine to apply, 'the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one.' " (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278 (*Quiroz*).) "The relation-back doctrine typically applies where an amendment identifies a defendant previously named as a Doe defendant [citation] or adds a new cause of action asserted by the same plaintiff on the same general set of facts. [Citations.] An amended pleading will also relate back if it makes a mere technical change in the capacity in which the plaintiff sues on the same cause of action [citations] or substitutes a plaintiff with standing in place of a plaintiff who lacks standing. [Citations.] [¶] In contrast, an amended pleading that adds a new plaintiff will

not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater liability against the defendants." (*San Diego Gas & Electric*, *supra*, 146 Cal.App.4th at pp. 1549–1550.)

Abuzaid was not added as a plaintiff to the amended cross-complaint to cure a technical defect. Instead, both of his causes of action were new to the amended cross-complaints. Further, because Abuzaid was the sole plaintiff, he would have been required to prove a contract or other legal relations between him *personally* and Pier 39 to prove either his breach of fiduciary duty or breach of implied contract claim, rather than the earlier alleged contractual relations between Flags and Pier 39. As a result, he necessarily was seeking "to enforce an independent right." (*San Diego Gas & Electric*, *supra*, 146 Cal.App.4th at p. 1550.) For the same reason, the new causes of action relied on a new and different instrumentality from the earlier claims. Further, because these claims alleged harm to Abuzaid personally, rather than to his corporation, they alleged a different injury than Flags's claims. (*Quiroz*, *supra*, 140 Cal.App.4th at p. 1278.) Accordingly, the relation-back doctrine was unavailable to preserve the timeliness of his claims.

Quiroz is illustrative here. In that case, the brother and mother of the decedent filed a wrongful death action, contending they suffered harm as the result of the decedent's death, which was caused by the defendant's inadequate medical care. They sought compensation for their own damages, not harm to the decedent. (*Quiroz*, *supra*, 140 Cal.App.4th at pp. 1266–1267.) Following the expiration of the statute of limitations, they amended the complaint to add a survivorship claim, asserted by the mother as personal representative, seeking compensation for the defendant's negligence toward the decedent. (*Id.* at p. 1267.) The court concluded the survivorship claim did not relate back. Although the new claim was based on exactly the same facts as the original claims, the court reasoned the new claim sought compensation for a different injury, the harm to the decedent, and was asserted by a different plaintiff, the mother acting in her capacity as personal representative, rather than her individual capacity. (*Id.* at p. 1278.)

In the same way, Abuzaid, a new plaintiff, was seeking compensation for his own damages, rather than those of the corporation.

In arguing to the contrary, Abuzaid relies primarily on *Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670. That case, however, merely featured the substitution of a plaintiff who had exhausted his administrative remedies for a plaintiff who had not, thereby curing a technical defect. (*Id.* at p. 1678.) As the court noted, it was a change of form, rather than substance. (*Ibid.*) For the reasons discussed above, the addition of new claims by Abuzaid was not a merely technical change.

III. DISPOSITION

The trial court's judgment for Pier 39 on Flags's cross-complaint is affirmed, as is the trial court's subsequent order granting Pier 39 attorney fees in connection with this cross-complaint. The trial court's judgment against Flags on Pier 39's cross-complaint, included in the court's April 22, 2010 joint judgment against Flags and Abuzaid, is amended by reducing the compensatory damages awarded to Pier 39 from $440,780 to $97,586.52, but the judgment against Flags is otherwise affirmed. The judgment against Abuzaid on Pier 39's cross-complaint, also included in this joint judgment, is reversed, and the matter is remanded for further proceedings on Pier 39's claims against Abuzaid as guarantor. Except as expressly set out, the trial court's remaining orders are affirmed. The parties shall bear their own costs on appeal.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Banke, J.